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OGC 73-1980

19 October 1973

MEMORANDUM FOR: Chief, WH Support

SUBJECT : Marital Status of Staff Employee After [redacted] Divorce Proceeding 25X1A

REFERENCES : A. Outgoing Message [redacted] 25X1A
dtd 4 Oct 73

B. Incoming Message [redacted] 25X1A
[redacted] dtd 9 Oct 73 25X1A

C. OGC Opinion 69-2213, dtd 26 Nov 69, Subj: Foreign Divorce Decrees: Consequences and Problems Confronting Agency Employees

D. OGC Opinion 69-~~0891~~ 2073, dtd 3 Nov 69, Subj: Travel of Children Whose Custody is in Divorced Mother

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25X1A 1. Mr. [redacted] of your staff requested the opinion of this Office on the legal status of a staff employee, [redacted], stationed in [redacted]
25X1A [redacted] The facts of this case, as we understand them and as indicated in references A and B are as follows:

a. The employee had two children by his first marriage. This marriage culminated in a divorce granted in Las Vegas on 28 February 1964, while the employee was stationed in [redacted] Both 25X1A
25X1A [redacted] and his first wife were present and participated in the Nevada court proceeding. The proceeding granted full custody of the two children to the first wife, with [redacted] paying $35 per month 25X1A
per child for their support.

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b. The employee married for the second time in Las Vegas on 2 April 1966. His second wife had two children previous to this marriage. The employee legally adopted these two children under the provisions of Nevada law. In 1967 the employee and his family were transferred to [redacted] The employee and his second wife had a child during this marriage. This marriage culminated in a divorce granted in the [redacted] on 18 August 1973, while the employee was stationed there (he was transferred there in 1972). The second wife appeared in court and participated in the divorce proceedings in [redacted] The proceedings granted full custody of the three children to the second wife; however, [redacted] has temporary custody, until mid-January 1974, of the child born of this marriage. The second wife and the two children that she has custody of have moved to Arkansas.

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c. The employee now intends to remarry the first wife in a ceremony to be performed in South Carolina.

Your main concern centers on which of the five children constitute the employee's dependents.

2. The problems arising out of a foreign divorce are extremely complex as explained in reference C. Generally, where a court, having jurisdiction to do so, grants a divorce which is valid within the jurisdiction, it is regarded as valid in every other jurisdiction (Atherton v. Atherton, 181 U.S. 155, 1901). This is required with respect to judgments to which the full faith and credit clause of Article 4 of the U.S. Constitution applies. This clause does not apply to a divorce obtained in a foreign country. Thus, U.S. courts are not required to give full force and effect to a divorce granted there. However, judgments of courts of foreign countries are recognized here because of the comity due the courts and judgments of one nation from another. Such recognition is granted to foreign judgments with due regard to international duty and convenience and to rights of citizens of the U.S. and others under the protection of its laws. 24 Am. Jur. 2d Divorce and Separation § 964 (1966).

3. The rule of comity, however, has several important exceptions and qualifications. A decree of divorce will not be recognized by comity where it was obtained by a procedure which denies due process of law, or was obtained by fraud, or where the divorce offends the public policy in the state where recognition is sought, or where the foreign court lacked jurisdiction. If the divorce is pronounced by a tribunal which does not have jurisdiction to do so, it may be attacked collaterally on that ground in a court in this country and it will not be recognized by comity. Ordinarily, our courts will not recognize a divorce obtained in a foreign country if neither spouse had a domicile in the foreign country that granted the divorce. The rule that a domicile of at least one of the spouses is essential to give the court jurisdiction to grant a divorce applies to decrees of foreign nations as well as to decrees entered within the U.S. even though a domicile is not required by the laws of the jurisdiction which grants the divorce. An element which has been considered and given great weight against the recognition of a foreign divorce decree under the rules of comity is the fact that the plaintiff went to the country in which the decree was rendered merely for the purpose of obtaining the divorce, intending to remain there no longer than was necessary to accomplish his purpose. Although we are unable to find case law on the point, a logical argument could be made for the converse in that if one did not go to the state or country merely to obtain a divorce, then comity should be granted. In addition, in New York at least, it has been held that a balanced public policy requires that recognition of a bilateral (both parties participating) Mexican divorce be given rather than withheld, and that such recognition as a matter of comity offended no public policy of that state (Rosenstiel v. Rosenstiel, 209 N E 2d 709, 1965, cert denied 384 U.S. 971, 1966).

4. Domicile is the legal concept that in its most basic terms means a person's permanent home. Thus, domicile involves an element of intention, that is, it is the place to which, during an absence, one has the intention of returning and from which he has no present intention of moving. 25 Am. Jur. 2d Domicile, § 1 (1966). In order to determine a person's intent the courts will examine a

number of factors among which are (a) the place that the person declares is his permanent home (for home leave purposes, for example), (b) the place where the person owns real property, (c) the place where the person pays local taxes, (d) the place where the person votes, and (e) the place where he resides and the length of time thereof. Obviously, the lack of precision in our ability to determine a person's intention makes domicile a somewhat loosely defined legal concept; however, the courts are forced to weigh these factors in order to determine domicile. Further, a person can only have one domicile at a time. A place remains his domicile until the person intends--as evidenced by the factors discussed above--to make another place his domicile.

5. Based on the facts as outlined above, it is certainly possible that if a court was required to determine [redacted] domicile 25X1A
it could find that it has been California throughout the period that he has been associated with the Agency. Technically, this means that both of his divorces could be subject to question; however, the strength of Article 4 of the U.S. Constitution stands behind his
25X1A Nevada divorce. Since [redacted] second wife was a resident of
25X1A [redacted] before the divorce proceeding commenced, as she appeared in court and participated in the proceeding, and as they both were residents there for some time before the proceeding
25X1A and [redacted] remained a resident thereafter, it is our opinion that comity would probably apply and the [redacted] divorce 25X1A
would probably be recognized by U.S. courts. Furthermore, in California at least, where a foreign divorce decree is properly presented in evidence there is a presumption that it is valid, and the burden of showing that it is void, as for lack of jurisdiction, is upon the party who attacks the foreign divorce. DeYoung v. DeYoung, 165 P. 2d 457. Yet the courts in California do not deny the right to attack such a foreign decree merely because the party attacking appeared in the foreign action. Kegley v. Kegley, 60 P. 2d 482. The only case law from Arkansas that we can find is not directly in point in that the case involved a husband who visited Mexico for nine days and gave no testimony in a divorce proceeding there. Furthermore, the Mexican divorce was granted on grounds not recognized in Arkansas. Bethune v. Bethune, 94 SW 2d 1043. However, each state has the right to determine the marital

status of its citizens under its laws, including the recognition of marriages and divorces secured by them in foreign jurisdictions, and the general rule is that the validity of a marriage is determined by the place where it is contracted. 52 Am. Jur. 2d Marriage §§ 80 (1970). We can find no case law specifically in point whereby we could conclude that South Carolina would recognize the [redacted] divorce as valid. Thus, while we are reasonably certain that the [redacted] divorce would be upheld in the U.S. courts, as this divorce lacks the backing of the Constitution, we cannot state this absolutely and without any qualification. Accordingly, we recommend that you apprise [redacted] of the factors outlined above regarding the validity of his foreign divorce so that he can seek further private counsel if he so chooses.

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6. [redacted] Dependents are defined in the Agency regulations at [redacted] Further, as the Overseas Differential and Allowances Act (P. L. 86-707) as amended, and the regulations adopted pursuant thereto apply to Agency employees, the definition of the members of an employee's family in the Standardized Regulations, Government Civilians, Foreign Areas is also applicable. Basically, these two definitions are identical and include all step, adopted and foster children who are unmarried and under 21 years of age or, regardless of age, are incapable of self-support.

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7. It is generally recognized that a decree of adoption results in the child assuming all the legal rights that he would have if he were the natural child of the adoptive parent. Furthermore, a status of adoption when legally created pursuant to the laws of the forum of the adoption proceedings will be recognized and given effect in other states. 2 Am. Jur. 2d Adoption, §§ 1 and 12 (1962). Parents are under an obligation to support their children and a divorce decree does not alone relieve the parents of liability for the support of the children of the marriage. 2 Am. Jur. 2d Divorce and Separation § 857 (1966).

8. This Office has recognized (reference D) tha[redacted] defines dependents without regard to their place of residence, legal custody, source of support or any other factor. Notwithstanding this broad definition or the legal requirement for the

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father to support his children, and consistent with rulings of the Comptroller General and government travel law generally, we took the position in reference D that the purpose and meaning of the CIA Act and regulation are that the cost of travel of an employee's children to visit him and return to their place of residence with their mother when he was assigned abroad may not be paid in those instances in which the children are in the legal custody of their mother and reside with her. Furthermore, the Standardized Regulations require that to be part of an employee's family the relative must reside at his post, except in certain circumstances not applicable here.

9. As documented in detail in reference C, the Comptroller General has held that except in New York, until a U.S. court determines the validity of the particular foreign divorce, a subsequent marriage is of too doubtful legality to permit the Government to approve increased allowances on account of the subsequent marital relationship. Such decisions have been made even when both parties appeared and participated in the foreign divorce. However, in none of the Comptroller General decisions were the facts such that the parties to the foreign divorce were residents in the foreign country as is the case here. In 36 Comp. Gen. 121 (1956) and B-176973 (24 Jan. 1973) the Comptroller General, citing 143 A.L.R. 1312, states that:

> It is well established that unless a foreign court granting a divorce had jurisdiction over the subject matter of the divorce by reason of bona fide residence or domicile there, of at least one of the parties, its decree of divorce will not, under the rules of international comity, be recognized in one of the States of the United States, even though the laws of such country do not make residence or domicile a condition to its courts taking jurisdiction.

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As [redacted] and his second wife were bona fide residents of the [redacted]--they did not go there for the purpose of obtaining a divorce--at the time of their divorce there, it is our opinion that this divorce is not of the doubtful legality that would prevent payment of allowances based on a subsequent marriage. Accordingly, we can find no legal objection to [redacted] allowances being increased after his contemplated marriage based on the number of dependents that reside with him.

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[redacted]
Office of General Counsel

cc: D/Personnel

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